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INCOMM FINANCIAL SERVICES, INC.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CAROLYN CLARK, et al.,

Plaintiffs,

v.

INCOMM FINANCIAL SERVICES,
INC.,

Defendant.

Case No.: 5:22-CV-01839-JGB-SHK

**DEFENDANT'S STATEMENT IN
REPLY TO PLAINTIFF CAROLYN
CLARK'S NON-OPPOSITION TO
MOTION FOR SUMMARY
JUDGMENT**

Hon. Jesus G. Bernal
Date: June 17, 2024
Time: 9:00 a.m.
Courtroom: 1

1 Defendant InComm Financial Services, Inc. (“InComm”) respectfully
2 submits this statement in reply to Plaintiff Carolyn Clark’s Response to InComm’s
3 Motion for Summary Judgment or, in the Alternative, to Deny Class Certification.

4 Plaintiff has affirmed in her Response that she does not oppose the relief
5 sought in InComm’s motion. Thus, all parties agree that Plaintiff’s remaining claims
6 should be dismissed with prejudice. InComm furthermore has no objection to
7 Plaintiff’s proposed order granting that relief. However, InComm reserves its right
8 to seek attorneys’ fees pursuant to 28 U.S.C. § 1927, as well as any other appropriate
9 relief relating to Plaintiff’s counsel’s conduct of the case and the attendant
10 imposition of unnecessary fees and costs on InComm. InComm would make such
11 application, if any, within 30 days of the Court’s entry of an order dismissing
12 Plaintiff’s claims.

13 A recent nonparty production of documents demonstrates that Plaintiff’s
14 alleged purchase of a Vanilla eGift Card, which is the basis of her claims against
15 InComm, never actually took place. In InComm’s view, the emergence of this
16 evidence and surrounding circumstances also raise questions about counsel’s
17 conduct of the case. This is the impetus of InComm’s contemplated motion for fees
18 or other relief.

19 **PROCEDURAL AND FACTUAL BACKGROUND**

20 As the Court is aware, Plaintiff alleges in the operative Complaint that she
21 purchased a Vanilla eGift Card from InComm’s Vanilla Gift website in or around
22 late 2021 (*see* Dkt. No. 54 (“SAC”) ¶ 18), and has repeated that assertion in her
23 sworn discovery responses. However, she has no record of the purchase or of her
24 card information. In an effort to fill this information vacuum, InComm served a July
25 2023 interrogatory asking Plaintiff to identify, among other things, the “method of
26 payment used” to buy the eCard. (Interrog. 2, First Set of Interrogs., Dkt. No. 143-
27 9.) Clark responded in September 2023 that she had used her “Bank of Hemet debit
28 card.” (Clark’s Initial Resp. to Interrog. 2, Dkt. No. 143-9.) She reiterated this

1 assertion at her November 2023 deposition. (Clark Dep. 35:25–36:10, 63:14–17,
2 Dkt. Nos. 143-11, 143-12.)

3 From there, however, the trail went cold, as detailed in InComm’s motion.
4 When InComm served a request for the relevant Bank of Hemet transaction records,
5 Plaintiff responded that she had closed the account, no longer had the records, and
6 was unable to obtain them despite a “reasonable and diligent search.” (Clark’s Resp.
7 to RFP 5, Second Set of RFPs.) But she assured InComm that, “[t]o the extent such
8 documents [were] located in the future, [she would] supplement the production,
9 accordingly.” (*Id.*) She likewise testified in her deposition that she had been denied
10 access to her records despite two visits to HCN Bank, the successor to Bank of
11 Hemet. (Clark Dep. 70:14–71:23.)

12 In March 2024, InComm filed the pending motion, detailing the absence of
13 evidence to support Plaintiff’s claims and her professed inability to obtain any. It
14 was then that Plaintiff’s counsel evidently decided—for the first time—to pursue the
15 missing bank records. On March 21, 2024, Plaintiff’s counsel served a subpoena on
16 HCN Bank. Contrary to Plaintiff’s claim that HCN Bank had stymied her
17 “reasonable and diligent” pursuit of the records, the bank provided Plaintiff’s
18 counsel with the requested records promptly on March 26, 2024. The records
19 showed that Plaintiff had made no purchase from the Vanilla Gift site in December
20 2021, nor at any other time from December 2020 to February 2022, the period for
21 which bank records were produced.

22 Although Plaintiff had represented to InComm that she would “supplement”
23 her production if the elusive records materialized—as Fed. R. Civ. P. 26(e)
24 requires—that did not occur. Instead Plaintiff’s counsel sat on the information for
25 two weeks, until InComm asked what had become of the subpoena. During those
26 two weeks, Plaintiff’s counsel took the deposition of InComm witness Amy
27 Strauser, who had submitted a declaration in support of InComm’s motion. Ms.
28 Strauser’s deposition entailed significant expense, including travel of three of

1 InComm’s attorneys to Denver for two days. These costs were entirely gratuitous
2 because, as Plaintiff’s counsel already knew by that point, Plaintiff had not even
3 purchased a Vanilla eCard.

4 Beyond the injury of wasted money and time, there was also an insult.
5 Plaintiff’s counsel had insisted on deposing Ms. Strauser so they could cross-
6 examine her about her declaration, in which she recounted *InComm’s* extensive and
7 unsuccessful efforts to find any evidence of Plaintiff’s alleged eCard purchase. And
8 indeed, Plaintiff’s counsel spent most of the deposition trying to cast doubt on Ms.
9 Strauser’s conclusion that the purchase never took place. All the while they knew,
10 and did not tell InComm, that Ms. Strauser’s conclusion was correct.

11 **REQUESTED RELIEF**

12 InComm’s motion demonstrated, and Plaintiff agrees in her recent
13 “Response,” that the case should be dismissed with prejudice. Accordingly,
14 InComm requests that the Court grant InComm’s motion, enter judgment in
15 InComm’s favor, and dismiss all remaining claims with prejudice.

16 InComm further requests that, alongside its order resolving the claims, the
17 Court provide InComm with 30 days in which to make any application for the
18 imposition of sanctions and/or for an award pursuant to 28 U.S.C. § 1927. InComm
19 believes this will be sufficient time to assess the fees and costs it has incurred and to
20 make a decision about whether to pursue any such motion.¹

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22
23
24
25 ¹ InComm has no intention of pursuing any such application against Plaintiff Clark
26 herself. One of the many unfortunate aspects of this case is that Clark suffers from
27 a cognitive impairment (*see* Dkt. No. 143-1 at 8-9) but that this fact did not dissuade
28 Plaintiff’s counsel from proposing her as a putative class representative, subjecting
her to the discovery process, and putting her through litigation that, if they had
performed reasonable diligence, they would have known she could never win.

Respectfully submitted,

Dated: May 21, 2024

By: /s/ William A. Delgado

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INCOMM FINANCIAL SERVICES, INC.

CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for InComm Financial Services, Inc., certifies that this brief is three pages, which complies with the page limit set by Court order dated October 20, 2022.

Dated: May 21, 2024

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